

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

In re NOELLE M., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

NOELLE M.,

Defendant and Appellant.

C056780

(Super. Ct. No. J5127)

APPEAL from a judgment of the Juvenile Court of Lassen
County, Stephen D. Bradbury, Judge. Affirmed as modified.

Tim Warriner, Under the appointment by the Court of Appeal,
for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette,
Chief Assistant Attorney General, Michael P. Farrell,
Senior Assistant Attorney General, Michael A. Canzoneri and
Barton Bowers, Deputy Attorneys General, for Plaintiff and
Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this
opinion is certified for publication with the exception of parts
I, III and IV of the Discussion.

Noelle M. (the minor) appeals from an order of the Lassen County Juvenile Court declaring her a ward of the court and committing her to the Department of Juvenile Justice (DJJ) based upon her admission of two counts of involuntary manslaughter (Pen. Code, § 192, subd. (b)(counts I, II)); one count of conspiracy to sell methadone (§ 182, subd. (a)(1)(count III)); and five counts of selling methadone (Health & Safety Code, § 11352, subd. (a)(counts XI-XV)).

On appeal, the minor contends the court violated Penal Code section 654¹ by sentencing her for both conspiracy to sell methadone and selling methadone, and by imposing separate sentences for the five counts of selling methadone. She also contends the trial court improperly calculated both her maximum period of confinement and her precommitment credits. We agree that the court erred as claimed in the minor's first, third and fourth contentions, but disagree that she was improperly sentenced on the five sale counts.

FACTS

As to the eight counts the minor admitted, the facts are uncontested. The minor and Ryan F. conspired to steal the latter's grandmother's methadone pills and sell them to other juveniles at a high school homecoming football game. The minor sold pills to seven students, two of whom died from overdosing.

¹ Hereafter, any undesignated statutory references are to the Penal Code.

The court determined the minor's maximum period of confinement was 13 years 4 months, calculated as follows: The upper term of 4 years for the manslaughter in count I; a consecutive term of 16 months for the manslaughter in count II; a consecutive term of 16 months for the conspiracy in count III; and five consecutive terms of 16 months for each of the five sales in counts XI through XV.

DISCUSSION

I

The minor contends the trial court violated section 654's proscription against multiple punishments for a single act or course of conduct by sentencing her for both the conspiracy to sell methadone pills and the sale of those pills.² The People agree and so do we.

Punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense. (*In re Cruz* (1966) 64 Cal.2d 178, 181; *People v. Mason* (1969) 276 Cal.App.2d 386, 389.) Consequently, the sentence imposed for the conspiracy count must be stayed.

² Section 654 provides: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

II

The minor contends that sentencing her to consecutive terms for each of the five sales counts is prohibited by section 654 because "all of the counts of furnishing Methadone were pursuant to a single objective, i.e., furnishing of the drug at the football game, and represent an indivisible course of conduct[.]" The minor is incorrect.

"[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [Citation.] . . . [¶] On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 551-552, fn. omitted (*Perez*).)

The minor views her circumstances as having a single objective, to wit, the sale of the methadone pills, which was accomplished during a single course of conduct, to wit, selling

them during the football game. The minor's concept of a single objective in these circumstances is too broad.

Although neither party has cited any case directly on point, and our research has disclosed none, *Perez, supra*, 23 Cal.3d 545, provides appropriate guidelines. There, the defendant enticed a female into his apartment and over the next 45 minutes to an hour engaged in, *inter alia*, acts of oral copulation, sodomy and rape. (*Id.* at p. 549.) As is pertinent here, the trial court sentenced the defendant to consecutive sentences for two rapes, but, pursuant to section 654, stayed execution of the sentences for the two counts of forcible oral copulation and the two counts of forcible sodomy because the court concluded that the oral copulations and sodomies were committed to obtain the objective of "sexual gratification." (*Id.* at pp. 548, 552.)

The Supreme Court disagreed, reasoning as follows: "Such an intent and objective is much too broad and amorphous to determine the applicability of section 654. Assertion of a sole intent and objective to achieve sexual gratification is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.] It would reward the defendant who has the greater criminal ambition with a lesser punishment. [Citation.] [¶] A defendant who

attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act. We therefore decline to extend the single intent and objective test of section 654 beyond its purpose to preclude punishment for each such act." (*Id.* at pp. 552-553.)

Here, by parity of reasoning with *Perez*, *supra*, 23 Cal.3d 545, the minor's claim that her sole objective was to sell the pills to other juveniles at a football game is too broad for purposes of section 654 because her culpability increased with each illegal act of selling the methadone pills. Each sale was unique and constituted a separate objective. Consequently, section 654 does not preclude the sentencing for each act of sale.

The minor claims that her circumstances "are most analogous to [those of] *People v. Bauer* (1969) 1 Cal.3d 368 [*Bauer*]." We disagree.

In *Bauer*, by ruse the defendant and an accomplice gained entrance to the home of three elderly women, blindfolded them, tied them up, ransacked the home and took items belonging to each of them, including a vehicle. (1 Cal.3d at p. 372.) The defendant was convicted of burglary in the first degree, robbery in the first degree, grand theft, and automobile theft. (*Id.* at p. 371.) He was sentenced to concurrent terms for the robbery and the auto theft; he was not sentenced on the burglary and grand theft counts. (*Id.* at pp. 371-372.)

On appeal, the defendant contended section 654 prohibited punishment for both the robbery and the auto theft. (*Bauer*, *supra*, 1 Cal.3d at p. 375.) The California Supreme Court agreed, noting that the "cases make clear that where a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible." (*Id.* at p. 377.)

Bauer, *supra*, 1 Cal.3d 368 is distinguishable from the present case. *Bauer* involved a single count of robbery with items having been stolen from three victims on the same occasion. The issue was whether one of the stolen items, which constituted a separately defined offense (auto theft), could serve as a basis for additional punishment. The present case involves five counts of sales to five separate persons over the course of several hours. Consequently, *Bauer* is factually distinguishable and thus of no aid to the minor.³

III

The minor contends the juvenile court miscalculated her maximum period of confinement by imposing a consecutive term of 16 months for the involuntary manslaughter offense in count II. She is correct, and the People so acknowledge. The court

³ Our resolution of defendant's contentions renders it unnecessary to address the People's proposition that multiple punishment was appropriate under the multiple-victim exception of section 654, specifically, that the minor's crimes involved violence against multiple victims.

accepted the probation officer's sentencing memorandum which indicated that the middle term for involuntary manslaughter was four years, thereby making the subordinate term 48 months. However, the middle term is three years. Consequently, the subordinate term should have been one year.

IV

The minor contends the juvenile court failed to credit her precommitment custody time with eight days she was in custody. The minor is correct, as the People again acknowledge.

The minor was in custody from September 26, 2006, through July 11, 2007, i.e., the date of her arrest through the date that she was returned from a diagnostic study at the DJJ, a total of 289 days. The minor's disposition hearing was conducted on July 19, 2007, i.e., eight days later, and she did not receive credit for this period. We shall direct the juvenile court to correct its records accordingly.

DISPOSITION

The juvenile court is directed to correct its records to show that the minor's maximum period of confinement is 12 years 4 months and that she is entitled to 297 days of precommitment

custody. In all other respects, the order committing the minor to the DJJ is affirmed.

MORRISON, J.

We concur:

SIMS, Acting P.J.

RAYE, J.